No. 707

Supreme Court of the United States.

October Term, 1942.

BENJAMIN W. FRIEDMAN,
Petitioner,

v.

BEE MACHINE COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

AND

BRIEF IN SUPPORT THEREOF.

MARSTON ALLEN,
NATHAN HEARD,
Counsel for Petitioner.

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To the Honorable Supreme Court of the United States:

Your Petitioner respectfully shows:

Summary Statement of the Matter Involved.

The respondent in June, 1937, brought suit in the United States District Court, Southern District of Ohio, Western Division, against the petitioner, a resident of Ohio, based upon a contract entered into between the respondent and the petitioner on November 29, 1933. Trial was had and by a decision rendered August 14, 1939, Judge Nevin decreed that the said contract had been canceled by petitioner for cause or breach of condition justifying the cancellation upon petitioner's part. Appeal was taken by respondent to the Circuit Court of Appeals for the Sixth Circuit, and on June 6, 1941, the decree of Judge Nevin was affirmed by that Court without opinion.

Notwithstanding this, respondent on March 3, 1941, brought suit against petitioner in the Superior Court of Essex County, Massachusetts, in an action of contract for damages for breach by petitioner of the said contract of November 29, 1933, and secured service upon petitioner by catching him at a hotel in Boston, Massachusetts.

Diversity of citizenship thus existing, the action was removed by petitioner to the United States District Court for the District of Massachusetts, and on May 15, 1941, petitioner filed a motion for summary judgment upon the ground that the issue raised by the action was *res judicata* as a result of the decree of the United States District Court for the Southern District of Ohio, entered October 7, 1939, pursuant to the aforesaid decision of Judge Nevin. On October 6, 1941, Judge Brewster sustained the motion for summary judgment on the ground of *res judicata* by the decree of the Ohio District Court, then affirmed by the Circuit Court of Appeals for the Sixth Circuit, holding:

> "The facts established beyond controversy prevent a recovery in this action. No genuine issue of a material fact remains to be considered."

As stated by Judge Brewster:

> "On the day before the hearing on defendant's [petitioner's] motion for a Summary Judgment, the plaintiff [respondent] filed a motion to add to its complaint a new cause of action."

This proposed new cause of action was entitled: "Added Amended Complaint for Triple Damages under the Antitrust Laws of the United States," and was obviously for the purpose of substituting for the original action in contrast, which was without foundation or merit, an independent

cause of action in tort based upon alleged violation of the Federal Antitrust Laws. Hearing was had by Judge Brewster upon this motion, and by an opinion rendered January 16, 1942, he held that the jurisdiction of the Federal Court in this removed action was derivative and that the District Court was without jurisdiction to entertain the proposed cause of action entirely distinct from the original and which was without the jurisdiction of the State Court.

Thereupon a decree for summary judgment in favor of the defendant was entered January 16, 1942.

Respondent then appealed to the Circuit Cou t of Appeals for the First Circuit from the said decree dismissing the complaint as *res judicata* and from the denial of its motion to amend the complaint to add the new cause of action.

On November 6, 1942, the United States Circuit Court of Appeals for the First Circuit handed down its opinion and decision on aforesaid appeal, sustaining the District Court on its summary judgment dismissing the complaint, and remanding the case to the District Court to exercise his discretion as to whether or not to deny petitioner's motion to amend the complaint to add an action for triple damages under the Antitrust Laws of the United States, but reversing the District Court on the jurisdictional point upon which he had expressly denied the petitioner's motion.

In deciding this issue, the Court of Appeals said:

> "But the action in the case at bar was begun in a court of the Commonwealth of Massachusetts, a court which, although it had jurisdiction over the claim for breach of contract, did not have jurisdiction over the claim under the antitrust laws. 15 U.S.C. Sec. 15; Blumenstock Bros. v. Curtis Pub. Co., 252 U.S. 436, 440. For this reason the court below held that it did not have jurisdiction to allow the amendment because the only jurisdiction which it had derived from the jurisdiction

> of the Massachusetts Court. There are authorities squarely in support of this view, (Carroll v. Warner Bros. Pictures, 20 F. Supp. 405; Noma Electric Corp. v. Polaroid Corp., 2 F.R.D. 454), but they are not binding upon us and we decline to follow them."

It is by reason of the decision and decree of the United States Circuit Court of Appeals for the First Circuit in reversing Judge Brewster of the District Court by holding that the amendment to the complaint adding an action for triple damages under the Antitrust Laws of the United States was within the jurisdiction of the District Court, that your petitioner respectfully prays for a writ of certiorari for the purpose of review of the decision and decree of the United States Circuit Court of Appeals for the First Circuit rendered and entered November 6, 1942.

The Question Presented.

The only question presented is whether a plaintiff may amend his complaint in a removed action so as to state a new and independent cause of action against the defendant which would be outside the State Court's jurisdiction.

Reasons Relied upon for the Allowance of the Writ.

1. The Circuit Court of Appeals for the First Circuit in its decision has decided an important question of Federal law, namely, the jurisdiction of a District Court in an action removed from a State Court, in a way probably in conflict with applicable decisions of this Court.

2. The decision of the said Circuit Court of Appeals in thus holding that the District Court had jurisdiction in this removed action to allow an amendment to the complaint add-

ing a new and independent cause of action outside the jurisdiction of the State Court has so far departed from the accepted and usual course of judicial proceedings relative to the established principle of derivative jurisdiction in removed actions as to call for an exercise of this Court's power of supervision.

3. The Circuit Court of Appeals in its decision has decided an important question of Federal law, namely, the jurisdiction of a District Court in an action removed from a State Court in conflict with the decisions of District Courts in other circuits showing a conflict which should be settled by this Court.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the First Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a certain day to be therein named, a full and complete transcript of the record and all proceedings on the case numbered and entitled on its docket No. 3781, *Bee Machine Co., Inc., Plaintiff-Appellant,* v. *Benjamin W. Freeman, Defendant-Appellee,* and that the said decree of the United States Circuit Court of Appeals for the First Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as this Honorable Court may see meet and just.

MARSTON ALLEN,
NATHAN HEARD,
Counsel for Petitioner.

Certificate.

This petition is in our judgment well founded, and is not interposed for purpose of delay.

MARSTON ALLEN,
NATHAN HEARD,
Counsel for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1942.

BENJAMIN W. FREEMAN,
Petitioner,
v.
BEE MACHINE CO., INC.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the District Court (Rec. p. 107) has been reported in 42 Fed. Supp. 938. The opinion of the District Court (Rec. p. 100) on the contract issue is reported in 41 Fed. Supp. 461.

The opinion in the Circuit Court of Appeals for the First Circuit (Rec. p. 117) is dated November 6, 1942, in the October Term of 1942, No. 3781, and reported in 131 F. (2d) 190.

II.

Jurisdiction.

1. The date of the decree to be reviewed is November 6, 1942.

2. The statute under which jurisdiction is invoked is section 240 of the Judicial Code, 28 U.S.C.A. § 347.

3. The United States Circuit Court of Appeals for the First Circuit misinterpreted the purpose of the section of the removal statute (U.S.C. § 81) which provides: "The District Court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suits had been originally commenced in said District Court," in holding that it permitted the adding of a cause of action in the District Court in a removed cause where the original State Court from which it was removed had jurisdiction over the subject of the removed cause, but would have had no jurisdiction over the said added cause, and thus completely doing away with the doctrine of derivative jurisdiction. In so holding, the Court of Appeals has misinterpreted the decisions in the cases of *Minnesota* v. *United States*, 305 U.S. 382, *Lambert Co.* v. *Baltimore & Ohio Railroad Co.*, 258 U.S. 377, and *General Investment Co.* v. *Lake Shore & Michigan Southern Railway Co.*, 260 U.S. 261, and construed the law oppositely to its construction in various District Courts, when it held that the rule of these cases applied only when there was complete lack of jurisdiction in the State Court over the removed cause in the first instance.

III.

Statement of the Case.

The case has already been stated in the preceding petition under the heading "Summary Statement of the Matter Involved," and is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals for the First Circuit erred in holding that it is proper for a District Court to

permit an amendment of a complaint in a case removed from a State Court for the addition of a cause of action under the Antitrust Laws of the United States, of which cause the State Court had no jurisdiction, and based on a state of facts unrelated to those of the removed cause.

2. The Circuit Court of Appeals for the First Circuit erred in disregarding completely the established theory of derivative jurisdiction in removal causes.

3. The Circuit Court of Appeals for the First Circuit erred in deciding an important question of Federal law in conflict with the decisions of District Courts in other circuits as showing a conflict which should be settled by this Court.

Carroll v. *Warner Brothers Pictures, Inc.* (District Court, Southern District, New York). 20 Fed. Supp. 405.

Howe v. *Atwood et al.* (District Court, Eastern District, Michigan, Southern Division), 55 U.S.P.Q. 177.

Noma Electric Corp. v. *Polaroid Corp.* (District Court, Southern District, New York), 2 Fed. Rules Dec. 454.

V.

Argument.

The first paragraph of petitioner's "Added Amended Complaint for Treble Damages under the Anti-Trust Laws of the United States" is as follows:

> "1. The Action arises under the Anti-Trust Laws of the United States, Title 15 U. S. Code, Sections 1-27, and particularly Section 15 thereof, to recover threefold the damages sustained by the plaintiff and the costs of the suit, including a reasonable attorney's fee." (Rec. p. 95.)

Actions which are based solely upon the Federal Antitrust Laws can be brought only in the Federal Courts.

Inasmuch as the above contentions cannot very well be questioned, then it would appear that what the petitioner is trying to do is to add a cause of action by way of amendment to a complaint on a contract which was originally brought in a State Court and has arrived in the Federal Court by way of the removal statutes, which cause of action could never have been entertained by the State Court.

The doctrine referred to by Justice Brandeis in *Minnesota* v. *United States*, 305 U.S. 382, is completely sound and is applicable to the present cause. In the decision Justice Brandeis says the following on page 389:

> "As Congress did not grant permission to bring this condemnation proceeding in a state court, the federal court was without jurisdiction upon its removal. For jurisdiction of the federal court is in a limited sense a derivative jurisdiction. Where the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although in a like suit originally brought in a federal court it would have had jurisdiction."

This rule was also stated in the case of *General Investment Co.* v. *Lake Shore & Michigan Southern Railway Co.*, 260 U.S. 261, wherein Justice Van Devanter states the following on page 288:

> "When a cause is removed from a state court into a federal court the latter takes it as it stood in the former. A want of jurisdiction in the state court is not cured by the removal, but may be asserted after it is consummated. Cain v. Commercial Publishing Co., 232 U. S. 124, 131, et seq.; Cowley v. Northern Pacific R. R. Co., 159 U. S. 569, 583; De Lima v. Bidwell, 182

U. S. 1, 174; Lambert Run Coal Co. v. Baltimore & Ohio Railroad Co., 258 U. S. 377.

"It follows that so much of the bill as based the right to relief on asserted violations of the Sherman Anti-Trust Act and the Clayton Act was rightly dismissed; but the dismissal, being for want of jurisdiction, should have been without prejudice."

In the case of *Howe* v. *Atwood et al.*, 55 U.S.P.Q. 177, decided October 13, 1942, a suit for royalties under a patent license was brought in a Michigan State Court and removed to the Federal Court by the defendant, whereupon the plaintiff presented an amendment to the complaint setting up an action for infringement of the licensed patents. The District Court quoted from *Minnesota* v. *United States*, 305 U.S. 382, and from *Noma Electric Corp.* v. *Polaroid Corp.*, 2 Fed. Rules Dec. 454, as to the jurisdiction of the Federal Court in a removed action, and said:

"Here, however, plaintiff amended his own bill of complaint asking injunction against further infringement. May he not then voluntarily enlarge the scope of the jurisdiction? The answer we believe is correctly given above and in DeLima v. Bidwell, 182 U.S. 174, where the court states:

" 'Defendant neither gains nor loses by the removal, and the case proceeds as if no such removal had taken place.'

"Both Minnesota v. United States and Noma Electric Corporation v. Polaroid Corporation, supra, were decided subsequent to adoption of the new civil rules so it is apparent that those rules neither extended nor limited jurisdiction of the district court. In fact, they so provide (Rule 82)."

It is interesting to note that the above decision mentions the fact that both Justice Brandeis' decision in *Minnesota* v. *United States* and *Noma Electric Corporation v. Polaroid Corporation* were decided *since* the New Rules of Federal Procedure, so it is clearly apparent that the new rules in no way affect this rule.

This same rule was followed in *Carroll* v. *Warner Brothers Pictures,* 20 Fed. Supp. 405, a case completely parallel to the present case. In the Carroll case the State Court had jurisdiction of the original cause of action, which was not based on a Federal statute, and thus attempted to add another cause of action under the Federal statute after removal. Judge Laibell in the District Court in New York held that, since the Federal Court had only a derivative jurisdiction, the situation was the same as if the cause of action under the Federal statute had been attempted to be made part of the original action in the State Court. The rule has been followed in the Second Circuit recently as evidenced by the the following case:

> *Noma Electric Corporation* v. *Polaroid Corporation,* 54 U.S.P.Q. 138 (Southern District of New York).

The only basis for the decision of the Court of Appeals was a quotation from a statement in Moore's Federal Practice under the New Federal Rules, section 15.01, in criticism of the Carroll case, which stated:

> "The holding of the instant case compels the plaintiff to institute a separate action for violation of the antitrust laws. But if this is done and the action is brought in the federal district court where the removed action is pending, the court may consolidate it with the removed action pursuant to Rule 42. Since federal jurisdiction will not be enlarged by the amendment, practical

considerations justify amendment in situations of this kind."

The above quotation from Moore has no foundation in the authorities at all. It talks about the hardship of the plaintiff and completely disregards the hardship on the defendant in following Moore's theory. The respondent in the present case was served in a hotel room in Boston and exercised his constitutional right of removal to the Federal Court. If the respondent had not exercised the right of removal and had permitted the case to remain in the State Court, which he could have done, he would never have been subjected to this new cause of action, unless he were sued separately in the Federal Court *and proper service were first had upon him.* For this reason the exercising of a right by the respondent, which right is supposed to benefit him, would, in effect, penalize him.

Moore in his discussion states:

> "Had the fourth count [charge of violation of the Federal Antitrust Laws] appeared in the complaint filed in the State Court, dismissal of that count for lack of jurisdiction, after removal, would have followed the doctrine of the General Investment Co. v. Lake Shore & Michigan Southern Ry. case."

His theory then is that, if the complaint in the State Court originally contained a cause of action of which the State Court had jurisdiction and a cause of action under the Federal Antitrust Laws, and the case was then removed to the Federal Court, the cause of action under the Federal Trust Laws would have to be dismissed in view of the decisions of this Court, but that after it was dismissed the plaintiff could then move to amend the complaint by setting up a cause of action under the Federal Antitrust Laws. This would appear to be an absurdity on its face.

The Circuit Court of Appeals in its opinion states that this Court in the cases of *Lambert Run Coal Co.* v. *Baltimore & Ohio Railroad Co.*, 258 U.S. 377, *General Investment Co.* v. *Lake Shore & Michigan Southern Railway Co.*, 260 U.S. 261, and *Minnesota* v. *United States*, 305 U.S. 382, had under consideration actions—

> ". . . over which a state court had no jurisdiction was removed to a federal court, and it held that, the state court having no jurisdiction the federal court could acquire none upon removal even though the federal court would have had jurisdiction if the action had originally been brought in that court. The reason for this rule appears to be that because of lack of jurisdiction there was, legally speaking, no action pending in the state court and hence no action which could be removed to the federal court."

But this statement is, we respectfully submit, incorrect certainly with respect to *General Investment Co.* v. *Lake Shore & Michigan Southern Railway Co.* The facts of this case appear in the opinion of the Circuit Court of Appeals for the Sixth Circuit, 269 Fed. 235, 238-241, where the cause of action based upon violation of the Constitution and laws of Ohio was discussed at length and it was concluded:

> ". . . we think it was not only within the power, but it was the duty, of the court below to consider whether a good case was made under the State laws."

Thus it is clear that there was a cause of action in the original complaint of which the State Court had jurisdiction when the cause was removed to the Federal Court and this Court considered the allegations of the bill as to the right of relief under the Ohio State Constitution and laws and held that a right to equitable relief was not shown, and dis-

missed this part of the bill as well as that part charging violation of the Federal Antitrust Acts, 260 U.S. 288-290.

It is true that this Court observed that there was some ground for thinking that the cause of action under the State laws was something of a makeweight, but it was clearly sufficient to require and to receive consideration and action by the Court. Certainly, the original cause of action in the case here at bar was no more substantial, because the record here shows, as we have pointed out, that the respondent here as its only cause of action set forth one which was entirely without merit being *res judicata* as finally determined by the Circuit Court of Appeals.

After the action was removed to the Federal Court, a separate action could not be brought in that Court against petitioner, a resident of Ohio, unless he could by chance be "found" in Massachusetts. Petitioner is protected by law against being so "found" if he comes to Massachusetts to attend the trial of the removed action. This is no mere matter of procedure; it is a substantive right of petitioner.

This right cannot be taken from him by the subterfuge of an amendment to the complaint in the removed action. This is an underlying principle of the theory of "Derivative Jurisdiction" repeatedly confirmed by this Court. The Act of June, 1934, chapter 651, under which this Court established the Rules of Civil Procedure, explicitly provided that—

> "Said Rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant";

and Rule 82, made in accordance therewith, further specifically provides:

> "These Rules shall not be construed to extend or limit the jurisdiction of the District Courts of the United States or the venue of actions therein."

This statute and this rule were for the very purpose of protecting a litigant against such a subterfuge. The proposed amendment to the complaint at bar seeks to do by indirection what cannot be done directly. It runs squarely counter to the fundamental policy of the removal of actions as defined by this Court. For example, in *Cowley* v *Northern Pacific Railroad*, 159 U.S. 569, this Court said with respect to a removed action:

> ". . . it remains in substance a proceeding under the Statute, *with the original rights of the parties unchanged.*"

This Court took particular pains to emphasize the statement which we have italicized, saying:

> "If any action or proceeding in a State Court was subject to be defeated or impaired by one of the parties exercising his statutory right to remove it to a Federal Court, no one would be safe in instituting such a proceeding in any case wherein, by reason of diversity of citizenship or otherwise, it might be subject to removal"—

and quoted from *Davis* v. *Gray*, 16 Wall. 223, 231:

> ". . . 'a party by going into a National Court does not lose any right or appropriate remedy of which he might have availed himself in the State Courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals.' "

The question of venue or jurisdiction of the person is not a matter lightly to be disregarded. It depends upon substantive law. The right of a person to be sued only in the district of which he is an inhabitant is carefully guarded by

the general venue statute, Judicial Code, section 51, and, as stated in *General Investment Co.* v. *Lake Shore & Michigan Southern Railway Co.*, 260 U.S. 261:

> ". . . its purpose being to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district or whereever found."

Any exception to this general provision must be made by specific statute. This general principle is emphasized in the Rules of Civil Procedure in Rule 82, referred to by Judge Goddard, which provides:

> "These rules shall not be construed to extend or limit the jurisdiction of the District Courts of the United States *or the venue of actions therein.*"

Now, being "found" is a sporadic, temporary thing, very different from being "an inhabitant." The petitioner Freeman was "found" at one particular time and subjected to suit on a cause of action in contract, and with which, under Massachusetts law [General Laws (Ter. Ed) c. 231, sec. 7 (sixth)] could not be joined a cause of action in tort. The original cause of action was removed to the District Court, but this did not make Freeman "an inhabitant" so that he could be served at any time. The only way in which jurisdiction can be obtained of Freeman in this district for a cause of action under the Antitrust Laws is by having him "found" here. This result cannot be secured by "amending" an existing complaint, because it would not only violate the whole theory of venue, but it would be in direct violation of Rule 82, which is superior to Rule 15.

Conclusion.

We respectfully submit that the Circuit Court of Appeals for the First Circuit by its decision has completely misconstrued the law as laid down by this Court, has overruled in effect the decisions of at least four District Court judges following the decisions of this Court, has disregarded the explicit provisions of Rule 82 of the Rules of Civil Procedure, and, finally, has destroyed the established theory of derivative jurisdiction in a removed case.

To permit this decision to stand means that your petitioner, or any other citizen, by exercising his right under the Constitution to remove an action from a State to a Federal Court thereby renders himself, by amendment to the complaint, subject to an action under the Antitrust Laws, an action for infringement of a patent, an action for infringement of a copyright, or any other independent cause of action cognizable by the Federal Courts. Such has not been the law, at least ever since this Court held in *Davis* v. *Gray*, 16 Wall. 223, 231:

> "... a party by going into a National Court does not lose any right or appropriate remedy of which he might have availed himself in the State Courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals."

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and thereafter reviewing and reversing the portion of the decision referred to.

MARSTON ALLEN,
NATHAN HEARD,
Counsel for Petitioner.